

EXHIBIT 1

**BEFORE THE
SOUTH CAROLINA PUBLIC SERVICE COMMISSION**

DOCKET NO. 2009-144-C

In the Matter of)	
)	
Application of TracFone)	
Wireless, Inc. For Designation as an)	LEGAL MEMORANDUM IN
Eligible Telecommunications)	SUPPORT OF REBUTTAL
Carrier in the State of South Carolina)	TESTIMONY OF F.J. POLLAK
for the Limited Purpose of Offering)	
Lifeline Service to Qualified Households)	

TracFone Wireless, Inc. (“TracFone”), by its counsel, provides this Legal Memorandum in support of the Rebuttal Testimony of F.J. Pollak. This Legal Memorandum addresses the legal question of whether TracFone is required to contribute to the South Carolina Universal Service Fund (“State USF”). For reasons that will be explained in this Memorandum, TracFone is not required to contribute to the State USF even if it is designated as an Eligible Telecommunications Carrier (“ETC”) for the limited purpose of providing Lifeline service.

Introduction and Factual Background

TracFone is a provider of mobile services. Mobile services is defined in the Communications Act of 1934, as amended, as “radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves”¹ Since TracFone provides mobile service to the public for profit, it is considered to be a Commercial Mobile Radio Service (“CMRS”) provider. TracFone provides CMRS by reselling the underlying services of various facilities-based CMRS providers. TracFone’s CMRS is provided on a prepaid basis only.

¹ 47 U.S.C. § 153(27).

In September 2005, the Federal Communications Commission (“FCC”) exercised its authority under Section 10 of the Communications Act of 1934, as amended (47 U.S.C. § 160) to forbear from application or enforcement with respect to TracFone of the requirement that ETCs provide service either using their own facilities or a combination of their own facilities and resale of other carriers’ facilities.² In April 2008, the FCC designated TracFone as an ETC in ten states and the District of Columbia for the limited purpose of offering Lifeline service.³ Since that time, TracFone has been designated as a Lifeline-only ETC by numerous state commissions. Wherever TracFone has been designated as an ETC to provide Lifeline service, it receives support from the federal Universal Service Fund in accordance with the FCC’s rules governing Lifeline support.⁴ TracFone provides to its Lifeline customers Lifeline benefits equal to one hundred percent of the support it receives from the federal USF. In addition, TracFone provides each Lifeline customer with an additional monthly Lifeline benefit of \$3.50 funded entirely from its own resources.

As a provider of interstate telecommunications services, TracFone is required to contribute to the federal USF pursuant to Section 254(d) of the Communications Act.⁵ TracFone complies with that statutory obligation by filing periodic FCC Form 499 and remitting to the federal universal service fund the invoiced amounts of its federal USF contributions. In testimony filed in this proceeding, the Office of Regulatory Staff (“ORS”) has asserted that, if

² Federal-State Joint Board on Universal Service and TracFone Wireless, Inc., et al., 20 FCC Rcd 15095 (2005). The facilities-based requirement is codified at Section 214(e)(1)(A) of the Communications Act and Section 54.201(i) of the FCC’s Rules (47 C.F.R. § 54.201(i)).

³ TracFone Wireless, Inc., 23 FCC Rcd 6206 (2008).

⁴ 47 C.F.R. § 54.403.

⁵ 47 U.S.C. § 254(d).

designated as an ETC, TracFone would be required to contribute to the State USF.⁶ The purpose of this memorandum of law is to explain why ORS's assertion regarding State USF contribution obligations is incorrect based on applicable statutes and Commission precedents.

In South Carolina, generally, only wireline service providers are required to contribute to the South Carolina USF. On two occasions since 2001, the Commission has affirmatively determined that providers of wireless telecommunications services should not be required to contribute to the USF. First, in Order No. 2001-419 issued in Docket No. 97-239C (Proceeding to Establish Guidelines for an Intrastate Universal Service Fund), the Commission exercised its authority to exclude wireless revenues from the base of contributions for the USF. Again, in 2006, in Order No. 2006-335, also issued in Docket No 97-239C, the Commission reiterated its 2001 holding that wireless revenues should not be included in State USF assessments.

Although the Commission has determined twice over a five year period that wireless revenues are not subject to State USF assessment, the South Carolina Legislature has given the Commission authority to require other companies that provide telecommunications services to contribute to the South Carolina USF in certain limited, narrowly-described circumstances. Specifically, S.C. Code Ann. § 58-9-280(E)(3) provides that the Commission shall require any company providing telecommunications service to contribute to the USF, "if after notice and opportunity for hearing, the Commission determines that the company is providing **private local exchange services or radio-based local exchange services** in this State that compete with a local telecommunications service in this State." (emphasis added). In short, the authority of the Commission to subject other telecommunications carriers to state USF contribution obligations is

⁶ The Office of Regulatory Staff, Direct Testimony of James M. McDaniel, Docket No. 2009-144-C, submitted July 15, 2009, at p. 5 lines 8-17.

specifically limited to those carriers who provide private local exchange services or radio-based local exchange services.

As described herein, TracFone, a CMRS provider, does not provide either “private local exchange services” or “radio-based local exchange services” and is therefore not within the scope of companies which can be made subject to State USF contribution obligations pursuant to § 58-9-280(E)(3). In addition, the fact that the statute does not currently apply to wireless , including CMRS, is corroborated by recent legislative attempts to modify the statute to cover wireless service providers. Finally, TracFone will effectively contribute to the State USF by providing additional \$3.50 monthly support payments directly to Lifeline customers. Imposition of State USF contribution obligations in addition to those direct payments would result in double payment to support State universal service. Therefore, TracFone is not required to contribute to the State USF.

ANALYSIS

I. A Wireless ETC May Not Be Required to Contribute to the State USF Unless It Provides Either Private Local Exchange Service or Radio-Based Local Exchange Services in Competition with Any Local Exchange Carrier

In enacting Section 58-9-280(E), the South Carolina Legislature directed the Commission to establish the South Carolina USF “in continuing its commitment to universally available basic local exchange telephone service at affordable rates.”⁷ Pursuant to Section 58-9-280(E), the Commission shall require two types of entities to contribute to the South Carolina USF: (1) all telecommunications companies providing telecommunications services within South Carolina, as determined by the Commission;⁸ and (2) any company providing telecommunications services,

⁷ S.C. Code Ann. § 58-9-280(E).

⁸ S.C. Code Ann. § 58-9-280(E)(2).

if, after notice and opportunity for hearing, the Commission determines that the company is providing private local exchange services or radio-based local exchange services that compete with a local exchange service provided in South Carolina.⁹ “Telecommunications services” is defined as “services for the transmission of voice and data communications to the public for hire, including those nonwireline services provided in competition to landline services.”¹⁰ As noted above, the Commission has on two occasions since 2001 implemented its authority under Section 58-9-280(E)(2) to determine whether certain types of telecommunications providers must contribute by affirmatively excluding wireless providers from any State USF contribution obligation.

ORS relies on the Commission’s Order No. 2001-419 for its position that TracFone would be required to contribute to the State USF if it is designated as an ETC.¹¹ In that proceeding, the Commission “exclude[d] wireless revenues from the base of contributions for the State USF.”¹² The Commission, referencing S.C. Code § 58-9-280(E)(3), explained that that there “has not been sufficient evidence presented in this proceeding that any wireless communications service provider competes with any local exchange service provider in South Carolina.” However, the Commission further concluded: “if a wireless carrier applies to this Commission for carrier of last resort or eligible telecommunications carrier status, such application would be considered a declaration of that carrier’s intent to offer services *that compete with local telecommunications services* being provided in the State, and that carrier will

⁹ S.C. Code Ann. § 58-9-280(E)(3).

¹⁰ S.C. Code Ann. § 58-9-10(15).

¹¹ McDaniel Direct Testimony, at 5.

¹² Order No. 2001-419, at 36 (¶ 15). In 2006, the Commission affirmed its prior decision to exclude wireless service revenues from USF assessment. Order No. 2006-335, (Proceeding to Establish Guidelines for an Intrastate Universal Service Fund) July 3, 2006, at 3.

be required, upon approval of the request for carrier of last resort or eligible telecommunications carrier status, to contribute to the State USF.”¹³

Thus, the Commission has premised its position that carriers of last resort and ETCs must contribute to the State USF on Section 58-9-280(E)(3). That section authorizes it, following notice and an opportunity for hearing, to require a company providing telecommunications services to contribute to the State USF, if it “determines that the company is providing private local exchange services or radio-based local exchange services in this State that *compete with a local telecommunications service* provided in this state.”¹⁴ Importantly, that authority to impose State USF contribution obligations on telecommunications companies is not unlimited; it is not even applicable to all wireless or CMRS companies, as suggested by ORS. Rather, it is limited to two -- and only two -- specific subsets of companies, *i.e.*, i) those that provide private local exchange services or ii) those that provide radio-based local telecommunications services.¹⁵

The Commission’s application of Section 58-9-280(E) to a wireless ETC presumes that the term “radio-based local exchange services” encompasses all wireless or CMRS services. However, the Commission’s presumption as applied to TracFone’s service, is contrary to the South Carolina Code, the Federal Communications Commission’s description of radio-based

¹³ Order No. 2001-419, at 36-37 (¶ 15) (emphasis added).

¹⁴ S.C. Code Ann. § 58-9-280(E)(3)(emphasis added).

¹⁵ In support of its position that Section 58-9-280(E)(3) allows the Commission to require all wireless ETCs to contribute to the State USF, ORS referred undersigned counsel to the Commission’s October 3, 2008 Order No. 2008-672 issued in Docket No. 2008-299-C (Hargray Wireless, LLC *et al*). However, that order misapplies Section 58-9-280(E)(3) by identifying the issue before it as follows: “. . . whether there is local competition regarding the provision of private local exchange **or wireless services**” Order at 2 (emphasis added). Significantly, Section 58-9-280(E)(3) contains no reference to “wireless services.” By substituting its own term -- “wireless services” for the statutory term -- “radio-based local exchange services,” the Commission, in the Hargray order misconstrued the statute and sought to impose a statutory requirement on an entire class of providers (providers of wireless services) not covered by the statute.

local exchange carriers, and the intent of the South Carolina Legislature when it established statutory categories for the Commission to follow when determining which entities should be required to contribute to the State USF.

The South Carolina Code does not define “radio-based local exchange service,” but it does define “*basic local exchange telephone service*” as follows: “for residential and single-line business customers, access to basic voice grade local service with touchtone, access to available emergency services and directory assistance, the capability to access interconnecting carriers, relay services, access to operator services, and one annual local directory listing (white pages or equivalent).”¹⁶ TracFone’s CMRS service, provided using wireless technology, does not fall within the definition of local exchange service, as defined by the South Carolina Code. First, CMRS is not a local service; it enables subscribers to place and receive calls anywhere within the CMRS provider’s service area, which is generally nationwide. Unlike local exchange service in which customers may only initiate calls within the provider’s specified local exchange calling area, CMRS service, including that of TracFone, is a nationwide service, not a local service. TracFone customers in Columbia, SC may call persons in Columbia, MO, Columbia, PA, or anywhere else in the nation in the same manner as they call other persons in Columbia, SC. Second, CMRS providers do not issue local directory listings (also a component of the statutory definition of basic local exchange service). TracFone and other CMRS providers do not publish directories, nor do they arrange for their customers’ names and telephone numbers to be published in local exchange carrier’s directories. Therefore, a CMRS provider, such as TracFone, does not provide local exchange telephone service, as that service is defined in S.C.

¹⁶ S.C. Code Ann. § 58-9-10(9).

Code Ann., and, as such, it cannot be considered a provider of radio-based local exchange service.

Neither the Legislature nor the Commission has ever defined or explained what was intended to be encompassed within the statutory term “radio-based local exchange services.” However, the most reasonable explanation of “radio-based local exchange services,” would involve the use of radio-based (*i.e.*, spectrum-based) technology for the provision of local exchange service, either as a supplement to or lieu of wireline-based local exchange service technology. In 1988, the FCC established a radio-based local exchange service called “Basic Exchange Telecommunications Radio Service” or “BETRS.”¹⁷ BETRS involves use of radio frequencies allocated specifically for the provision of local exchange service for areas where radio-based technology is more suitable for such service than is wireline technology. In the BETRS Order, the FCC explained radio-based local exchange service in general, and BETRS in particular, as follows:

BETRS is provided so that radio loops can take the place of (expensive) wire or cable to remote areas. It is intended to be an extension of basic local exchange service. Because BETRS is provided as an extension of basic exchange service, we will require that a service provider be a State certified local exchange carrier, or if not a certified LEC, have some form of permission from the State to provide basic exchange radio service. We believe this prior State certification or permission is necessary because of the basic exchange nature of the service.¹⁸

The fact that radio-based local exchange service or BETRS not only was described by the FCC as an “extension of basic local exchange service,” and that such service specifically requires state authorization leads inexorably to the conclusion that CMRS service -- such as that provided by TracFone -- is not radio-based local exchange service. Unlike radio-based local

¹⁷ See In the Matter of Basic Exchange Telecommunications Radio Service, Report and Order, 3 FCC Rcd 214 (1988) (“BETRS Order”).

¹⁸ Id., ¶ 27.

exchange service or BETRS, CMRS service does not require either that the provider be a state certified local exchange carrier or that the provider have any form of permission from states to provide basic exchange radio service. Indeed, states are specifically prohibited by Section 332(c) of the Communications Act from regulating CMRS entry.¹⁹

Unlike CMRS service -- a wireless mobile service, BETRS is a fixed service that enables remote or rural subscribers to have local exchange service to fixed (stationery) locations, specifically, their homes. Indeed, as described by Dennis R. Patrick, the FCC Chairman when the BETRS Order was issued, BETRS enables rural households to obtain local exchange service. Then-Chairman Patrick explained the service as follows:

The Commission's authorization today of spectrum for Basic Exchange Telecommunications Radio Service (BETRS) represents yet another major step by the Commission in the pursuit of our goal of extending basic telephone service to as many Americans as possible. Many rural Americans do not have telephone service today because of the high cost of stringing copper wire from the telephone company's central office to their households. The use of sophisticated new radio technology and unused spectrum by BETRS provides another, more cost-effective alternative to connect those individuals to the telephone network.²⁰

It is clear from the above explanation that "radio-based local exchange service" as that term is used at Section 58-9-280(E)(3), refers to use of radio-based technology such as BETRS to provide fixed local service, more commonly called local exchange service, to geographic areas where deployment of wireline facilities to provide such service is economically prohibitive. In contrast, wireless mobile service, such as CMRS, including the CMRS service provided by TracFone, is not such a fixed service, is not local exchange service, and therefore is not "radio-based local exchange service" as used in Section 58-9-280(E)(3).

¹⁹ 47 U.S.C. § 332(c) ("... no State or local government shall have any authority to regulate the entry of or rates charged by any commercial mobile service . . .").

²⁰ Id., Statement of Chairman Dennis R. Patrick on Report and order Implementing *Basic Exchange Telecommunications Radio Service*, 3 FCC Rcd at 219.

Neither does TracFone provide “private local exchange services.” Again, nowhere in the South Carolina Code is the term “private local exchange services” defined. Nor has the Commission ever articulated a definition for that statutory term. In the absence of any statutory definition of “private local exchange services,” other sources must be considered. As noted above, the statutory definition of “basic local exchange service” codified at Section 58-9-10(9) contemplates the offering of access to basic voice grade local service by residential and single line business customers. While there is no statutory definition of *private* local exchange service, there is a statutory definition of “public.” Section 58-9-10(5) defines public as “. . . the public generally or any limited portion of the public, including a person or corporation.” Based on this statutory definition of “public,” under South Carolina law, a provider of telecommunications service to the public (*i.e.*, to the public generally or any limited portion of the public) would not be a provider of private local exchange service.

The Communications Act contains a statutory definition of “private mobile service.” That Act defines private mobile service as “any mobile service that is not a commercial mobile service or the functional equivalent of a commercial mobile service”²¹ As noted above, TracFone is a provider of CMRS. The Communications Act defines Commercial Mobile Service as “any mobile service that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public”²² As a provider of mobile services to the public, TracFone is a CMRS provider and is therefore not a provider of private mobile service.

Since TracFone is neither a provider of radio-based local exchange service nor a provider of private local exchange service, pursuant to Section 58-9-280(E)(3), the Commission does not

²¹ 47 U.S.C. § 332(d)(3).

²² 47 U.S.C. § 332(d)(1).

have authority to subject TracFone -- a CMRS provider only -- to a State USF contribution obligation even if it is designated as an ETC.

II. That Current South Carolina Law Does Not Require Wireless Providers to Contribute to the State USF Is Further Demonstrated by the Fact That the Legislature Has Considered Legislation Which Would Subject Wireless Service Providers to State USF Contribution Obligations

Moreover, the fact that Section 58-9-280(E)(3), in its current form, does not require CMRS providers to contribute to the State USF is demonstrated by the fact that in 2007, a bill was introduced in the South Carolina Senate which would amend Section 58-9-280 of the South Carolina Code “to modify the purpose of the fund and expand the contributors to the fund **to include wireless providers.**”²³ There would have been no need for such an amendatory bill if Section 58-9-280 already required wireless carriers to contribute to the State USF. The bill proposed amending Section 58-9-280(E) to delete the entirety of subsection (E)(3) and replace it with a revised subsection (E)(3) to require the following: “[a]ll communications services companies providing communications services within South Carolina must contribute to the USF.”²⁴ The bill also proposed amending Section 58-9-200 to redefine “communications services” to specifically include “a provider of commercial mobile radio service [CMRS] as defined in 47 C.F.R. §20.3.”²⁵

The fact that such a legislative proposal has been introduced in the South Carolina Senate to expand the South Carolina USF provisions to explicitly include CMRS providers demonstrates recognition by the Legislature itself that Section 58-9-280(E), as currently enacted, does not impose State USF contribution obligations on CMRS providers, irrespective of whether they are

²³ S. 464, 117th Session, 2007-2008, introduced February 20, 2007 (emphasis added).

²⁴ *Id.*, at 4.

²⁵ *Id.*, at 2.

ETCs and irrespective of whether they are deemed to “compete” with incumbent wireline local exchange carriers.

**III. Since TracFone Will Already Contribute to the Support
Of Lifeline Service, Imposition on it of an Additional Obligation
To Contribute Directly to the State USF Would Result in a
Discriminatory and Impermissible Double State USF Contribution Requirement**

Finally, imposition of a State USF contribution obligation on TracFone would result in TracFone effectively being required to contribute twice to the State USF. In this regard, the Commission’s attention is directed to Order No. 2001-419. In that 2001 order, the Commission provided that: “State funding in the amount of \$3.50 per month for each qualifying low-income customer will enable the providers of Lifeline assistance to be eligible for additional federal matching funds for Lifeline services.”²⁶ By that order, the Commission requires that each ETC providing Lifeline service shall receive from the State USF \$3.50 in monthly support per Lifeline customer.

Since TracFone is not eligible to receive the \$3.50 per month for each Lifeline customer from the State USF, in order to obtain the maximum allowable Lifeline support from the federal USF pursuant to 47 C.F.R. § 54.403(a)(3), TracFone must provide the entire \$3.50 of additional Lifeline support per customer per month from its own resources. As TracFone has explained in its ETC petition, it will do just that. As TracFone does in every other state where TracFone provides Lifeline service as an ETC, it provides from its own resources a monthly per customer benefit in the amount of \$3.50 in addition to the support which it receives from the federal USF. In other words, TracFone will contribute \$3.50 per month per Lifeline customer directly to Lifeline customers as an additional Lifeline benefit, rather than indirectly to Lifeline customers through contributions to the State USF -- contributions which are then distributed to Lifeline

²⁶ Order No. 2001-419, at 35 (¶ 11).

customers as Lifeline benefits. Therefore, the Commission should recognize that TracFone's provision of \$3.50 per month to each South Carolina Lifeline customer is its contribution to the State USF. No further State USF contribution would be required or should be required. TracFone is not aware of any ETC operating in South Carolina which is required to both provide additional \$3.50 in monthly Lifeline support from its own resources to each Lifeline customer and contribute to the State USF.

CONCLUSION

Based on the foregoing, TracFone is not obligated under applicable South Carolina law to contribute to the State USF. Moreover, the Commission should not require TracFone to contribute to the State USF as a condition for designation as an eligible telecommunications carrier.

Respectfully submitted,

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July 30, 2009

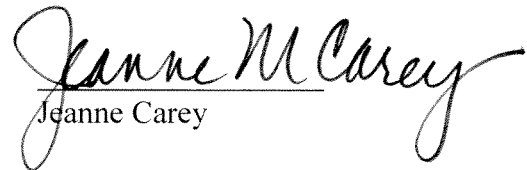
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I hereby certify that on July 30, 2009, I served one copy of TracFone's Rebuttal Testimony of F.J. Pollak and Legal Memorandum in Support of Rebuttal Testimony of F.J. Pollak by placing the documents in the U.S. Mail with first class postage paid the following individual:

Lessie Hammonds, Esq.
Office of Regulatory Staff
Post Office Box 11263
Columbia, SC 29211



Jeanne Carey

Columbia, South Carolina
July 30, 2009